No. 13802

In the UNITED STATES COURT OF APPEALS for the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S BRIEF

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I. JURISDICTIONAL STATEMENT

This case is before the Court upon the petition (R. 4449) of Boeing Airplane Company, herein called "Boeing" or "the Company," filed pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136; 29 U.S.C.A., § 151, *et seq.*), herein called the "Act,"[1] to review and set

[1]Relevant provisions of the Act are printed in the Appendix, **infra**, pp. A1-A5.

aside an order (R. 285) of the National Labor Relations Board, herein called the "Board," issued against Boeing on March 26, 1953, pursuant to Section 10(c) of the Act.

The proceeding before the Board in which the order complained of was issued began on March 29, 1951, when the Board issued a consolidated complaint against Boeing. On June 18, 1951, this complaint was superseded by an amended consolidated complaint (R. 4), based in part upon nine charges, and three amended charges, filed with the Board, two by Aeronautical Industrial District Lodge No. 751, International Association of Machinists, herein called "Lodge 751," and the others by individuals. The amended consolidated complaint alleged that Boeing had engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(1), (2), (3) and (4) and Sections 2(6) and (7) of the Act. Boeing filed an answer to this complaint admitting the jurisdictional averments thereof but denying that it had engaged in the unfair labor practices alleged (R. 33). After a hearing, the Board, on March 26, 1953, issued its decision and the order herein complained of (R. 269), dismissing the major portion of the complaint but finding that Boeing had violated Sections 8(a)(1), (2), (3) and (4) of the Act and ordering Boeing to cease and desist from certain acts and to take certain affirmative action, including offering reinstatement

to eight former employees and making them, plus two others, whole for any loss of pay suffered.

On April 13, 1953, Boeing filed in this Court its petition to review and set aside the Board's order (R. 4449). A copy of said petition was forthwith served upon the Board. On May 26, 1953, the transcript of the entire record in the proceeding, certified by the Board, was filed in this Court. On May 25, 1953, the Board filed its answer to the petition and a request for enforcement of its order (R. 4459).

Boeing is aggrieved by the order of the Board, which is a final order, granting in part the relief sought by Lodge 751 against Boeing. The unfair labor practices in question were alleged to have been engaged in within the State of Washington (R. 7), which is within this judicial circuit, and Boeing transacts business within said circuit (R. 5).

This Court has jurisdiction to review and set aside the Board's order under the provisions of Section 10(f) of the Act. This review is governed by said section of the Act and by the Administative Procedure Act (60 Stat. 237; 5 U.S.C.A. § 1001, *et seq.*).

II. STATEMENT OF THE CASE

This case involves events which occurred following a four and one-half months' strike at Boeing's plants in Seattle and Renton, Washington, in 1948.

Before outlining the Board proceedings, we first summarize the background.

Background

Boeing is a corporation engaged in the manufacture of aircraft at its plants in Seattle and Renton, Washington, and Wichita, Kansas. Only its operations in the State of Washington are directly involved in this case (R. 67). Lodge 751 and Aeronautical Workers, Warehousemen and Helpers Local 451, AFL, herein called "Local 451" or the "Teamsters," are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act (R. 67).

There is no evidence of anti-union background in Boeing's history. In 1937 Lodge 751 was duly certified by the Board and recognized by Boeing as the exclusive bargaining representative of substantially all of Boeing's production and maintenance employees (Gen. C. Ex. 36, R. 382, 2271). Such recognition and collective bargaining continued without interruption until April 22, 1948 (Gen. C. Ex. 36). During this interval several collective bargaining agreements were executed (R. 2271, 2322, Resp. Ex. 58). Early in 1948 negotiations were in progress looking toward the execution of a new agreement when the parties reached an impasse with respect to wages and a seniority policy (R. 68).

On April 22, 1948, approximately 14,675 Boeing

employees in the unit represented by Lodge 751 went out on strike (R. 2263). Boeing immediately took the position that the strike was called by Lodge 751 in violation of the 60-day notice provision in Section 8(d) of the Act and the no-strike clause in the contract then in effect, and that Lodge 751 had thereby lost its status as collective bargaining representative. Accordingly, Boeing withdrew its recognition of Lodge 751 and discontinued the negotiations then in progress (R. 2339-2340).

Boeing's position was fully sustained by the court in *Boeing Airplane Co. v. National Labor Relations Bd.,* D. C. Cir., 174 F. 2d 988, 991. The court held that Lodge 751 had

> ". . . forfeited all right to be considered as a collective-bargaining agent for employees of the Company."

The strike, which continued through the summer months of 1948, was marked by numerous acts of violence (R. 2424-2430). During the strike Boeing repeatedly urged the strikers to return to work (Gen. C. Ex. 2, 3 and 4; R. 363) and, prior to the end of the strike, 2,967 of them had returned (R. 2264). Boeing also carried on an extensive local and nationwide campaign to recruit additional employees (R. 350-353). By September 1, 1948, there were 7,879 employees at work in the unit formerly represented by Lodge 751 (Gen. C. Ex. 32, R. 324). The union which was chartered as Local 451, the Team-

sters local, was organized early in the strike by a group of Boeing employees who were dissatisfied with the representation afforded them by Lodge 751 (R. 2924-2931, 2081-2086). During the strike, Local 451 pushed its efforts to organize the new employees and the strikers who had returned (R. 2086-2091).

The strike ended on September 13, 1948, four and one-half months after it had begun (R. 383). Lodge 751 offered unconditionally to return its men to work (R. 69; Gen. C. Ex. 27), and early on the morning of the 13th six or seven thousand strikers gathered at the plant and presented themselves for reemployment (R. 2430). The strikers were reemployed as expeditiously as possible, and of the 8,954 strikers who thereafter applied for reemployment through Lodge 751 all but 64 were reemployed (R. 2266). By October 1, 1948, the number of employees in the unit formerly represented by Lodge 751 had risen to more than 11,000, and by the end of the year it was in excess of 18,000 (Gen. C. Ex. 32).

Shortly after the end of the strike, Lodge 751 began a vigorous organizing campaign within the plant and its organizers and those of Local 451 were accorded equal rights of access to the workers (R. 391, 394-395, 2315, 2327; Gen. C. Ex. 29 and 30). During the following months Lodge 751 and Local 451 vied for the right to represent the production and maintenance unit (R. 2359-2365; Resp. Ex. 59;

R. 2365). Following an election conducted by the Board on November 1, 1949, Lodge 751 was again certified by the Board and recognized by Boeing as the exclusive representative of substantially all of Boeing's production and maintenance employees (R. 69; Resp. Ex. 81, R. 3885). Since then, Lodge 751 and Boeing have entered into collective bargaining agreements (R. 69). Labor relations have been very amicable (Resp. Ex. 83, R. 3949; Resp. Ex. 86, R. 3950).

Board Proceedings

The amended consolidated complaint (R. 4) was very broad in scope. It was based in part on nine charges and three amended charges filed during the period from September 20, 1948, to June 15, 1951. The major portion of the complaint alleged that Boeing had discriminated against 259 individuals following the end of the strike in regard to hire or tenure of employment so as to discourage membership in Lodge 751 in violation of Section 8(a)(3) of the Act. (Par. XXVII, R. 28). Forty of these individuals were allegedly discriminated against because they had filed charges against Boeing, or because their names were listed in such charges, in violation of Section 8(a)(4) of the Act (Par. XXVIII, R. 32). The complaint also alleged that Boeing had, during and after the strike, dominated and supported Local 451, the Teamsters local,

in violation of Section 8(a)(2) of the Act (Par. XXVI, R. 28). Finally, it was alleged that, by certain specific acts (Par. VII, R. 7) and all the other acts alleged, Boeing had interfered with its employees in violation of Section 8(a)(1) of the Act (Par. XXV, R. 28).

The hearing before the Trial Examiner was held in Seattle from June 18, 1951, through September 11, 1951 (R. 54). More than 300 witnesses testified; in excess of 300 exhibits were introduced; and the resulting record consisted of approximately 6,000 pages of testimony and argument.

By the end of the General Counsel's case, he had withdrawn the allegations respecting 6 of the 259 persons allegedly discriminated against and, upon various motions to dismiss made by Boeing, the Trial Examiner had dismissed the allegations respecting all but 99 of the remaining 253. All of the 99 were in Lodge 751's unit, engaged in the strike, were rehired following the strike and thereafter were discharged or laid off (R. 63-66). In the Intermediate Report and Recommended Order, issued on January 3, 1952, consisting of 173 pages (R. 54-226), the Trial Examiner found that Boeing had discriminated against only 3 of the remaining 99, in that it discharged Parezanin because of his participation in the strike (R. 203), discharged Burrell because he refused to remove a Lodge 751 committeeman's badge (R. 207), and changed Haworth's

three-day layoff to a discharge because of his union activities (R. 208), thereby violating Sections 8(a)(3) and (1) of the Act (R. 221). He recommended that these 3 be reinstated with back pay (R. 225).

The Examiner found no violations of Section 8(a)(4) (R. 223-224). He did find that, for a time following the end of the strike, Boeing assisted and supported Local 451, thereby violating Sections 8(a)(2) and (1) of the Act (R. 219-221) and recommended that Boeing be ordered to cease and desist therefrom (R. 224). Finally, he recommended that the complaint be dismissed with respect to all the other unfair labor practices alleged (R. 221).

As to the remedy, the Trial Examiner found that the record did not indicate a general disposition to violate the Act. Accordingly, he concluded that the issuance of a broad cease and desist order would not be recommended (R. 223).

On March 26, 1953, the Board issued its final Decision and Order (R. 269). It adopted the findings, conclusions and recommendations of the Trial Examiner with certain additions, modifications and exceptions (R. 270). With regard to the alleged discrimination against individual employees, the Board adopted the Examiner's findings as to the 3 persons who had been discharged and, in addition, it found that Boeing had discriminated against 6 other individuals. It had suspended Cinotto for 3

days for violating a Company rule prohibiting the wearing of "I am loyal to 751" streamers in the plant (R. 272), discharged Gerber because of his activities against Local 451 (R. 273-277), laid off Haddix (R. 277-278) and Myrick (R. 278-279) because of their membership in and activities on behalf of Lodge 751, laid off McDonald (R. 279) because of his opposition to Local 451 and preference for the International Brotherhood of Electrical Workers, and demoted Schott because of her membership in Lodge 751, all in violation of Sections 8(a)(3) and (1) of the Act (R. 279-280).

The Board also found, contrary to the Examiner, that there had been one violation of Section 8(a)(4), namely, that Boeing had refused to rehire Nielsen because she had filed a charge against the Company (R. 280).

The Board affirmed the Examiner's findings with respect to Boeing's activities in support of Local 451. Finally, contrary to the Examiner, the Board found four independent violations of Section 8(a)(1), namely, the adoption and enforcement by Boeing of three rules (a rule prohibiting employees from wearing steward and committeeman buttons, a rule prohibiting employees from wearing "I am loyal to 751" streamers, and a rule applied by some supervisors which prohibited union activity on non-working time) (R. 270-272) and the remarks of an assistant foreman directed to two employees evi-

dencing bias in favor of Local 451. These remarks were considered not to have been isolated and insignificant (R. 273).

Contrary to the Examiner's recommendation, the Board also issued a broad cease and desist order (R. 286). Finally, Boeing was ordered to take the affirmative action usual in cases of this kind (R. 286-287).

The foregoing is the background of the case and a general recital of the facts. In order to facilitate decision of the case, the detailed facts pertinent to each issue involved are related in the appropriate section of our argument, Section V, infra.

Questions Involved

1. Whether, in view of the unusual conditions existing at the end of the strike, Boeing had the right to suspend one employee and discharge another for violating Company rules adopted to prevent violence and maintain production.

2. Whether the testimony that some minor supervisors mistakenly thought a policy existed prohibiting union activity on Company premises during working hours without evidence of any enforcement thereof, and whether the isolated remarks of an assistant foreman evidencing bias toward one union constitute independent violations of the Act.

3. Whether the evidence supports the finding that

Boeing unlawfully discharged three employees, laid off three others and demoted another or whether such actions were for cause.

4. Whether the evidence justifies the finding that one employee was not rehired because she filed an unfair labor practice charge.

5. Whether, for a time following the strike, Boeing assisted and supported Local 451, the Teamster's local.

6. Whether certain allegations of the complaint are barred by the statute of limitations prescribed by the Act.

7. Whether the activities of Boeing, as shown by the record, warrant the issuance of a broad cease and desist order.

III. SPECIFICATION OF ERRORS

The Board erred:

1. In holding that the rules: (a) prohibiting employees from wearing "I am loyal to 751" streamers and (b) prohibiting employees from wearing steward and committeeman buttons, adopted and enforced by Boeing, were unlawful (R. 270).

2. In holding that the suspension of Cinotto for refusing to obey rule (a) above was unlawful (R. 272).

3. In holding that the discharge of Burrell for refusing to obey rule (b) above was unlawful (R. 272).

4. In holding that a rule prohibiting union activity on Boeing's premises on non-working time was adopted and enforced and that such rule was unlawful (R. 270).

5. In holding that assistant foreman Smith's remarks of preference for one union were not isolated and that Boeing thereby violated the Act (R. 273).

6. In holding that the three discharges, three layoffs and one demotion were discriminatory and unlawful because such holding is contrary to the preponderance of the testimony and not supported by substantial evidence on the record considered as a whole (R. 273).

7. In refusing to give proper weight to and accept the Examiner's credibility findings with respect to Morrell's testimony and in crediting Gerber in connection with his discharge (R. 273).

8. In relying upon the hearsay evidence adduced by Carrig to substantiate its finding of unlawful assistance and support of Teamsters Local 451 and to support its holding that the discharge of Gerber was unlawful (R. 270, 276).

9. In reversing the Examiner's findings and failing to adopt his recommended order with respect to the demotion of Schott, as to which findings counsel for the General Counsel took no exception, because such reversal is not based on a valid interpretation of Section 10(c) of the Act (R. 279-280).

10. In holding that Boeing refused to rehire Niel-

sen because she had filed a charge with the Board (R. 280).

11. In holding that Boeing for a time unlawfully assisted and supported Teamster Local 451 (R. 270).

12. In denying Boeing's motion, based upon the six-months' statute of limitations prescribed in Section 10(b) of the Act, to dismiss the complaint pertaining to the demotion of Schott and the layoffs of Haddix, Myrick and McDonald (R. 270).

13. In holding that Boeing's activities which the Board found unlawful indicate a purpose to defeat self-organization of its employees, that such activities are potentially related to other unfair labor practices, that the danger of the commission in the future of such other unfair labor practices is to be anticipated, and that a broad cease and desist order is required (R. 283); and in issuing such order (R. 286).

14. In issuing an Order requiring Boeing to cease and desist from discouraging membership in, or in any other manner interfering with, restraining or coercing its employees in the exercise of the right to join or assist, the International Brotherhood of Electrical Workers, because the issuance of such an Order is not based upon any charges ever served upon Boeing, is beyond the scope of the complaint or any amendment thereof, is erroneous and is not

based upon a valid interpretation of Section 10(b) of the Act (R. 285-286).

15. In issuing the Order here involved because the material findings of fact upon which it is based are erroneous and not supported by substantial evidence on the record considered as a whole; the conclusions of law upon which it is based are not supported by the findings of fact and are contrary to law; and the Order is arbitrary and capricious, constitutes an abuse of discretion by the Board and exceeds the powers vested in the Board (R. 285-287).

IV. SUMMARY OF THE ARGUMENT

This case involves events in the year following a four and one-half months illegal strike ending September 13, 1948. Because of the volatile situation existing upon return of the strikers and the presence of two rival unions competing for recognition, the Company prohibited the wearing within the plant of ribbon streamers bearing the words "I am loyal to 175" and large committeeman badges. It is urged that these rules were manifestly proper and that the discipline by suspension of one employee for three days and discharge of another for disobedience of these rules, was within management's prerogatives.

In addition, the Company more rigidly enforced a policy of long standing forbidding union activities

on working time. Some few minor supervisors mistakenly understood the instructions to mean a prohibition on Company premises. However, there is no evidence of enforcement or any discipline imposed as the result of such error. This and a random remark or two by one minor supervisor about a year after the strike are so isolated and inconsequential that an unfair labor practice predicated thereon amounts to an abuse of discretion.

The remaining eight individual cases, out of the 259 originally in the complaint, upon which the Board ruled involve three discharges, three layoffs, one demotion and one instance of alleged failure to rehire on account of having filed an unfair labor practice charge. In each of these cases the Company was motivated by just and proper cause.

Where credibility is an issue, we are accepting the Examiner's findings without challenge and contest only the inferences drawn from the evidence or the sufficiency thereof to support the findings. In one instance the Board has reversed the Examiner's credibility findings, and on this we argue that the Board is patently wrong.

We contend the evidence does not establish that for a time following the strike Boeing assisted and supported the Teamsters local.

We also urge that certain allegations of the complaint are barred by the six months' limitation prescribed by the Act.

Finally, the record does not warrant the issuance of an omnibus cease and desist order.

In essence, the insufficiency of the evidence to prove the allegations of the complaint and to sustain the Board's decision is the premise of our attack upon the Board's order. This requires an examination into the detailed facts relating to each individual, and this is done at length hereinafter in the brief.

V. ARGUMENT

1. THE RULES, CINOTTO AND BURRELL

In view of the unusual conditions existing at the end of the strike, Boeing, in order to prevent violence and maintain production, had the right to adopt and enforce rules regulating employee conduct and to suspend Cinotto and discharge Burrell for violating them.

The Unusual Conditions

Mr. Gibson, who has been president of Lodge 751 since 1943 (R. 380-381), testified that on two or three occasions during the strike Lodge 751 was fined for violating a court order restraining its picketing activities (R. 398). The court's findings of fact in one of these contempt proceedings (Resp. Ex. 68; R. 2428), based on admissions made in open court, show that Mr. Gibson, in addressing several thousand members of Lodge 751 at a meeting held during the strike, reflecting the temper of Lodge 751, said substantially the following:

> "The Taft-Hartley Act prevents them from being fired. But it doesn't prevent us from taking action of our own. Down there at Boeing's, as you know, there are high scaffoldings, ladders and high jigs with scaffolding around them. Heavy bucking bars, drill motors, rivet guns and other heavy things that can be kicked off the deck or slip out of your hands and educate a scab. They can make a tight turn on the scaffolding and trip and fall * * * We promise to make it unhealthy for them. There are plenty of ways we can make it desirable for them to get off their jobs in a hurry." (Resp. Ex. 68, p. 5, R. 2428)

Mr. Dierst, the head of Boeing's Plant Protection Department (R. 2424), testified regarding the incidents of violence during the strike. Several employees who had returned to work across the picket lines were beaten (R. 2424-2425); threatening calls were made to the homes of some employees (R. 2429); three homes were bombed (R. 2425), and two were painted and smeared with the word "scab" (R. 2428); rocks were thrown through windows (R. 2429); and several automobiles were damaged (R. 2429). In addition, a Boeing employee was murdered in a parking lot two days before the strike ended, and while it was never determined who killed him, the fact that he was a Boeing employee working behind the picket lines was publicized in the local papers (R. 2429).

When the strike was called off, Lodge 751 instructed all its members to report for work for the first shift on Monday, September 13, 1948 (R. 390).

The result was that at 7:30 A. M., on the 13th, the employees who had returned to work across the picket lines during the strike, nine or ten thousand in number (R. 2435), were met at the plant gates by the mass of returning strikers seeking reemployment (R. 2430). Mr. Dierst described the situation which existed on Sixteenth Avenue South, near the main gate of the main plant, as follows:

> "A. When the strike was called off, the Union had publicized it, advising that the striking employees should come to the plant; and they started to drive in there somewhere between 5:30 and 6:30 in the morning, and by 7:30, when the employees were coming to work, it was estimated that there was between six and seven thousand on Sixteenth Avenue South, and we were able with the assistance of the police to get a line for the employees to get through. * * * the whole scene was just about ripe for a good riot if something sparked it off.
> * * *
>
> "A. The police were very apprehensive; they had a large number of uniformed policemen there, and they had a lot of plain clothes men scattered throughout the area.
>
> Q. How many uniformed officers were there?
>
> A. I would make a rough guess that they had in the neighborhood of 100 police there, and they also had some reserves stationed at the Georgetown Police Station ready to move in in the event that things got out of control." (R. 2430-2431)

He testified that the same situation continued for the next two or three days, although the number assembled decreased somewhat (R. 2434-2435).

This situation was also pictured and described

with less restraint in the *Aero Mechanic,* the official publication of Lodge 751 (R. 2135), dated September 16, 1948 (Resp. Ex. 69, p. 4, col. 1; R. 2434) reproduced in part herein (Appendix pp. A5-A6.

Mr. Dierst described the situation inside the plant as follows:

> "A. The situation was rather tense to start with. * * * The first few days the returning strikers were fed in rather rapidly, and we were mixing up the two groups where the feeling was running pretty high; * * *
> * * *
>
> A. Well, in some instances supervision advised us as to tense situations which they felt they had in their department, and in many instances there was the word 'scab' written on other people's tool boxes, and in the toilet, and various inflammatory remarks of that nature."
> * * *
>
> (R. 2435-2436)

During the strike Local 451 had been actively recruiting members among the Boeing employees and as a result claimed to have approximately 5,000 members (R. 2089). Mr. Logan, Vice President, Industrial Relations, Boeing, whose division included Boeing's office of labor relations, plant protection department and personnel department during the period in question (R. 339), characterized the problem of divided loyalty among the employees by saying:

> "We had in our plant at the time a substantial number, numbering in the thousands, of members of [the] two unions plus another substantial number, in the thousands, of people

who had not seen fit to affiliate with any union." (R. 2308)

Respondent's Exhibit 38 indicates that one month after the termination of the strike the two rival unions each had approximately 5,000 members, while 4,000 employees were unaffiliated.

The Rules; Cinotto and Burrell

At the end of the strike, the strikers returned to work wearing printed streamers about four inches long bearing the words "I am loyal to 751" (R. 360-361, 2063; Resp. Ex. 69, R. 2434). Mr. Logan testified that because Boeing thought the streamers incendiary and inflammatory in nature, it refused to permit them to be worn inside the plant gates (R. 360).

Doris Cinotto, a striker, returned to work on the day the strike ended (R. 2058-2059). On that day her supervisor observed that she was wearing one of the 751 streamers (R. 2063). He asked her to remove it, which she did, and further asked her not to wear it again. However, two days later she was again observed wearing a streamer inside the plant; and upon being asked to remove it, she did. Thereafter, her supervisor, after talking to her about wearing the streamer, after he had warned her, suspended her for three days because, as she put it, "That was about the only way that they could teach me." (R. 2064)

Prior to the strike, Lodge 751's shop committeemen wore a special badge, about an inch and a half in diameter (R. 2056), identifying themselves as shop committeemen (R. 360). Mr. Logan testified that during and after the strike Boeing did not permit these badges to be worn by anyone in the plant (R. 360).

Immediately prior to the strike, Stanley Burrell was employed by Boeing and held the office of shop committeeman in Lodge 751 (R. 2053). He went out on strike and remained out until the end. When the strike was over, Boeing sent him a telegram asking him to return to work. At that time he was still a shop committeeman as far as Lodge 751 was concerned, and he was instructed by the union to wear a shop committeeman's badge upon returning to work, which he did. After being advised by his foreman that he could not wear the badge because the foreman did not "recognize" it, he was twice asked to remove it and he twice refused. Thereupon he was suspended for refusing to remove the badge. Thereafter he did not apply for employment at Boeing, nor did Boeing ever call him back (R. 2053-2057).

The Rules, Suspension and Discharge Were Lawful

The Trial Examiner found that Boeing did not violate the Act by forbidding the wearing of the 751 streamers (R. 220). Considering the temper of the employees at the time the streamers appeared,

he was persuaded that Boeing's belief that these slogans were provocative and would tend to lead to disorder was a reasonable one. Consequently, he found no violation of the Act in the suspension of Cinotto (R. 220). The Board took a contrary position and held that both the rule and the suspension of Cinotto violated the Act (R. 270-272). The Trial Examiner found (R. 206-207) and the Board agreed (R. 272) that Burrell's discharge violated the Act. In addition, the Board, contrary to the Examiner, held that the rule prohibiting the wearing of shop committeemen badges constituted an independent violation of the Act (R. 270-272).

The Board holds that such rules are presumptively invalid, in the absence of special circumstances which make them necessary in order to maintain production and discipline. Its decision on this issue rests upon the case of *Republic Aviation Corp. v. National Labor Relations Bd.,* 324 U. S. 793. In that case the Supreme Court affirmed the ruling of the Board and, in doing so, quoted with approval the Board's view that the wearing of steward buttons did not carry any implication of recognition where there was no competing union in the plant. The language of the Board's decision quoted was, in part, as follows:

> " 'We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question as the representative of the employ-

> ees, *especially when, as here, there is no competing labor organization in the plant.* Furthermore, there is no evidence * * * that the appearance of union stewards in the plant *affected the normal operation of the respondent's grievance procedure'.*" (Emphasis added) (324 U. S. at 802, footnote 7).

In affirming the Board's decision, the Supreme Court said: "No evidence was offered that any unusual conditions existed in labor relations * * *" (324 U. S. at 801).

The Board decision in the instant case completely ignores the recognized exceptions noted in both the Board and the Supreme Court decisions, namely, "no competing labor organization in the plant" and no "unusual conditions". The Board inferentially recognizes that working time is for work and acknowledges the right of management to maintain production and discipline. When the two rules in question are examined in the light of the conditions existing at the end of the strike, it is apparent that they were solely designed to prevent violence, maintain production and preserve the necessary degree of neutrality required by law to permit employees a free choice in selecting their bargaining agent.

In this case there were three factors creating "unusual conditions", recognized by the Supreme Court as allowing more stringent regulations than might otherwise be permitted. The strike was long and bitter. Mr. Gibson expressed the view of returning strikers in terms of threats to the life and safety

of those who worked during the strike. Mr. Dierst described the charged atmosphere existing in and about the plant upon the return of the strikers. The record abundantly demonstrates that two strong unions were competing within the plant for representation rights.

The streamers "I am loyal to 751" were plainly inflammatory and irritating, and did not serve any legitimate union objective. On the contrary, they were obviously designed to taunt the workers then in the plant, thus providing a trigger calculated to set off violence and disrupt production.

The shop committeemen badges were also plainly inflammatory. Permitting them to be worn under these circumstances would have indicated an unlawful Company favoritism toward one of the two rival unions. The committeemen badges indicated recognition of an official status, especially in the matter of processing grievances, which in fact did not exist. An entirely different grievance procedure, not involving shop committeemen, was then in operation. For Boeing to have permitted shop committeemen badges would have carried the erroneous implication of recognition of Lodge 751. It is submitted that precedent supports the validity of such a rule under the unusual circumstances here in order to ward off violence between hostile rival unions.

Neither of the rules should be considered an in-

dependent violation of Section 8(a)(1) of the Act and the disobedience thereof furnished valid reasons for the suspension of Cinotto and the discharge of Burrell.

2. THE MISTAKEN RULE AND SMITH'S REMARKS

The testimony that some minor supervisors mistakenly thought a policy existed prohibiting union activity on Company premises during nonworking time without evidence of any enforcement thereof and the isolated remarks of an assistant foreman evidencing bias toward one union do not constitute independent violations of Section 8(a)(1) of the Act.

The Mistaken Rule and Smith's Remarks

Mr. Logan testified that immediately following the end of the strike Boeing believed it necessary to emphasize and more rigidly enforce the long-standing Company policy prohibiting union activities on Company time (R. 2306). Mr. Logan summarized the situation as follows:

> ". . . tension was high and tempers were short, and we felt that it was more than ever necessary to enforce with more rigidity this rule to prevent the generation of more heat than light, which in turn might cause violence in the plant, and disruption, and more than ever lost time in production." (R. 2306)

He further stated that "Company time," within the meaning of this rule, was considered to be all the time on shift except the two recess periods and the lunch period (R. 359-360). This rule was handed down verbally to supervision (R. 359).

In the entire record we have found only five employees who testified (R. 644, 906, 921, 932, 1632) that they were told not to engage in or discuss union affairs on Company premises. With over 1,000 supervisors (R. 2278), approximately 100 of whom testified during the course of the hearing, we have found only three, two assistant foremen and one foreman (R. 3161, 3184, 3196), who stated that they informed those under them that the Company policy was to forbid union activity on Company premises. However, there is no evidence that the rule, as mistakenly extended to Company premises, was enforced or that any disciplinary action was taken against any individual.

Caroline Scott and Dora Crozier testified that in the forepart of August 1949 their assistant foreman, Smith, indicated that members of Teamster Local 451 would have a better chance than some of the others of escaping the impending layoff (R. 2136-2139).

Insignificant and Isolated

The Trial Examiner, after noting the evidence that some supervisors extended the prohibition against union activities to Boeing's premises (R. 189), found that this did not violate the Act (R. 220). Although he credited Scott and Crozier respecting Smith's remarks, he found these did not violate the Act in view of their isolated character

and utterance by a minor supervisor (R. 220-221).

The Board, contrary to the Examiner, held that both the erroneous extension of the rule by some supervisors and Smith's remarks constitute independent violations of Section 8(a)(1) of the Act (R. 270, 273).

In *Ohio Associated Telephone Co. v. National Labor Relations Bd.*, 6 Cir., 192 F. 2d 664, 668, the court reversed the Board's decision, where the Board found a violation of the Act based on testimony that a traffic superintendent and a minor supervisor, following abandonment of the strike, said, "There would be no mention of union affairs on company premises." The court said that there was no evidence that any formal rule was promulgated or that any effort was made to enforce the informal warning. The examiner had considered the observations isolated and unrelated to any other issues considered at the hearing. There was evidence that the company had repudiated the supervisor's observations. The court went on to say that the Board was apparently affected by having found an unlawful discharge, which the court was reversing.

Here we have precisely the same factual circumstances. While there is no showing that Boeing repudiated the alleged error, there is no evidence that such error was ever brought to the attention of the higher echelons of management in order to permit repudiation. More importantly there is no evidence

that the rule in question was ever enforced. For these reasons the Board's reversal of the Examiner's conclusion should be rejected.

As regards Smith's remarks, if remarks made to two people about a year after the end of the strike by a lone foreman out of over 1,000 supervisors are not isolated and insignificant, we know of no way to describe or define "isolated". Inasmuch as General Counsel in two years' search was able to produce at the time of the hearing only two persons to testify that such remarks were made to them, we submit that the Examiner's finding that the remarks were isolated and were not worthy of a finding of a violation of Section 8(a)(1) of the Act is fully substantiated.

3. THE DISCHARGES, LAYOFFS AND DEMOTION

Haworth, Parezanin and Gerber were discharged, Haddix, Myrick and McDonald were laid off, and Schott was demoted for just and proper cause and the Boards' findings to the contrary are not supported by substantial evidence on the record considered as a whole.

When the charge is made that an employer has unlawfully discharged an employee in the exercise of the prerogatives of management, three things must be shown by substantial evidence to support the charge. It must be shown that the employer knew that the employee was engaging in a protected activity, that he was discharged by reason of

such activity, and finally that the discharge had the effect of encouraging or discouraging membership in a labor organization. The burden rests upon the General Counsel to prove these requisites by the preponderance of the competent and credible evidence. Until there is a reasonable basis in the evidence to support the first and second requisite, an employer need not excuse or justify his action. Even when the evidence does raise a reasonable inference of discrimination, that inference may be rendered unreasonable by the employer's excuse or justification. The burden of going forward then shifts to the General Counsel and requires additional evidence to establish the alleged discrimination. In order to supply a basis for inferring discrimination, it is necessary to show that the employee's engaging in a protected activity was the substantial or motivating reason for his discharge, despite the fact that other reasons may exist. These principles have been enunciated in many cases, e.g., *National Labor Relations Bd. v. Whitin Machine Works,* 1 Cir., 204 F. 2d 883, and cases cited therein. If the real motivation is disobedience, insubordination or disloyalty, the discharge is for cause. In *National Labor Relations Bd. v. Local Union No.* 1229, *IBEW,* ....., U.S. ....., 22 L.W. 4031, 4034, decided December 7, 1953, the Court said:

> "Many cases reaching their final disposition in the Courts of Appeals furnish examples em-

> phasizing the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the right of concerted activities. The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty."

Some of the instances of alleged discrimination involve a direct conflict between the testimony of an employee and the testimony of a supervisor, the employee testifying that some remark evidencing anti-union bias was made to him by a supervisor and the supervisor flatly denying that the remark was made. Recognizing that questions of credibility are generally for the Trial Examiner who has an opportunity to observe the demeanor of the witnesses (*National Labor Relations Bd. v. Swinerton,* 9 Cir., 202 F. 2d 511, 514), we do not challenge his findings as to the credibility of witnesses. Thus, in challenging the Board's findings where it accepted the Examiner's findings as to credibility, we differ from it solely as to the weight to be given the credited evidence and the inferences which may reasonably be drawn therefrom, assuming for the purpose of argument that the witnesses credited by the Examiner spoke the truth. However, where the Board refused to accept the Examiner's credibility findings, we take the position that the Board erred in this regard, as well as in assigning weight to the evidence and drawing inferences therefrom in reaching its ultimate conclusions.

The Discharges

Evidence on Haworth's Discharge

Jack E. Haworth, a punch press operator, returned to work after the strike in September 1948, and on January 27, 1949 was terminated for insubordination and misconduct (R. 1170-1171).

His assistant foreman, Pickett, testified that after having been given a work assignment Haworth took the work out of the press and, upon being challenged, said he had pulled the job "for my [Pickett's] benefit and I would have known it if I wasn't so God-damned thick-headed" (R. 3293). This testimony was based upon Pickett's written memo made the day of the incident. This was the second incident of this type (R. 3174-3175). Haworth's foreman, Megorden, testified that he made an investigation and determined that Haworth pulled the job out of the press and put in a much easier job to run, thus selecting his own job instead of taking his supervisor's orders (R. 3172). That an argument of some type occurred is confirmed by Haworth, who requested a pass-out slip "because of the nervousness caused by the argument" (R. 1182). Pickett testified that upon another occasion Haworth refused to work on a particular machine as requested, which machine was within the scope of his job assignment (R. 3295).

Another foreman, Pavlick, related a conversation with Haworth wherein Haworth expressed dissatis-

faction with his job and the amount of money he was receiving, and Pavlick said this attitude resulted in his not giving a full day's work (R. 3259-3260).

> "Q. In other words, he was disloyal to the Company?
> A. Well, I should say he was, yes. He wasn't giving a day's work for what he was getting out of it." (R. 3260)

Pickett also testified as to the insufficient quantity of Haworth's work (R. 3295). The Examiner believed Pickett's testimony as to Haworth's hostile attitude and apparent flouting of Pickett's authority, but he concluded that discharge was too severe a penalty and that Megorden, Pickett's superior, may have been influenced by Haworth's close connection with union activities in the plant (R. 207-208).

Haworth Was Discharged Because of Misconduct and Insubordination

The only evidence in the record which supports the Board's finding that Boeing discharged Haworth because of his participation in union activities is the testimony of Megorden that Haworth "was at that time very closely connected with the union activities going on at the plant there" (R. 3173), and that "Pickett had come to me previously and stated that Haworth was active in union work, and he was quite a booster, and he was a quick-tempered individual, which bore itself out later

when he refused to do what he was told to do" (R. 3183).

Mere reference to union activities does not establish that they were protected union activities. The burden is on the General Counsel to establish this fact. Many of the cases in this proceeding involved, as the Board found, improper union activities during working hours. Further, this reference to "union activities" should not be taken out of context where the evidence establishes other and more important considerations which prompted Megorden to take the action he did. In view of the substantial credited evidence concerning Haworth's insubordination, management and not the Board has the right to determine the penalty. Discharge for this reason is for "cause."

Evidence on Parezanin's Discharge

Don J. Parezanin was hired in May 1947, served as a Lodge 751 shop committeeman for two or three months during the fall of that year, stayed out for the period of the strike, during which he was not particularly active, and came back to work October 14, 1948 (R. 713-715). On November 2, 1948, he was suspended for twice leaving his shop without permission during an overtime work period (R. 716, 719, 722, 3272). This violated a strictly and uniformly enforced published Company rule (R. 3273-3274). Twice before he had been suspended for vio-

lating Company rules, once in the fall of 1947 for being absent from his work station without authorization (R. 729-730, 3279), and once in March 1948, for smoking in a nonsmoking area (R. 730). On November 8th he was given a hearing on his suspension before a board of supervisors presided over by Molitor, superintendent, sub-assembly (R. 719, 3285). Shortly thereafter he was discharged (R. 724, 732).

Parezanin testified that he had permission to leave his shop on both occasions (R. 726-727, 731) and that he so advised the supervisors at his hearing (R. 722). Molitor testified that at the hearing Parezanin admitted that he did not have permission on either occasion (R. 3286). Parezanin also testified that at his hearing he believed it was Molitor who asked him if he were loyal to Boeing and if he was why he did not go to work during the strike. Parezanin replied that he did not want to go through the picket line. According to Parezanin, Molitor retorted that it was an unlawful strike and that as soon as Parezanin learned that, he should have returned to work. Molitor then went on to ask what assurance Parezanin could give that he would be loyal to the Company should he be reinstated. When Parezanin responded, "My word", Molitor said that it appeared by reason of his prior grievance that his word wasn't any good (R. 720-722).

Molitor testified that absolutely no such line of

questioning or conversation occurred (R. 3285-3286). He further testified that Parezanin was discharged because he admitted that twice he knowingly and deliberately walked off the job without permission in violation of a Company rule, belligerently claiming that this was no reason to fire him (R. 3286-3287).

Parezanin Was Discharged for Violating a Company Rule

The Trial Examiner failed to credit Parezanin's assertions that he had permission to leave his shop (R. 203). Accordingly, he found that Parezanin was suspended for a non-discriminatory reason, namely, for leaving his shop without permission (R. 203). However, apparently crediting Parezanin's version of what occurred at his hearing, the Examiner found that Molitor's questioning established that Parezanin would have been reinstated at that time were it not for the fact that he had failed to work during the strike (R. 203). Thus, he concluded that Boeing discriminated against him because of his participation in the strike (R. 203). The Board adopted the Examiner's findings and conclusions respecting Parezanin without comment or modification (R. 270, 280).

The only evidence in the record which remotely supports the Board's finding is Parezanin's testimony as to what Molitor said at the hearing,

which apparently was credited by the Examiner. Although we believe it clear from the record that this credibility finding by the Examiner was erroneous, we shall assume for the purpose of argument that Molitor questioned Parezanin substantially as related by the latter.

Considering the case on this basis, it is our contention that the evidence does not support the inference drawn by the Board, from Molitor's questioning, that Parezanin was discharged because he failed to work during the strike. It seems highly improbable that Boeing, well knowing that Parezanin was a striker, rehired him following the strike and then, less than a month later, singled him out of the thousands of returned strikers and discharged him *because he was a striker*. Although he had been a shop committeeman for a short period during 1947, he was not prominent in union or strike activities.

On the other hand, mindful of the Examiner's conclusion that no general policy of discrimination against strikers existed (R. 214) and in view of the fact that Parezanin had twice before been suspended for violating Company rules, it seems plausible to conclude that Parezanin was discharged because of his third flagrant violation thereof on two occasions. We submit that Parezanin's participation in the strike had nothing whatever to do with his discharge.

Evidence on Gerber's Discharge

Arthur C. Gerber, a timekeeper, returned after the strike and was terminated December 7, 1948, for making threats to fellow employees concerning their job status. Morrell, chief timekeeper, upon receiving a report from another supervisor that Gerber was threatening fellow employees that they would be out of a job in thirty days if they did not join Lodge 751, investigated the matter and Gerber was terminated.

Trial Examiner's Crediting of Morrell Should Be Sustained

This particular case calls for the application of the well-established rule that the findings of an experienced and impartial trial examiner on veracity must not be overruled unless a very substantial preponderance of the evidence is against such conclusion.

The Board set aside the Examiner's credibility findings with respect to Morrell (R. 273), and instead credited the discharged employee (R. 274). Accordingly, it found, contrary to the Examiner, that Gerber's discharge was unlawful (R. 277). In overturning the Examiner's crediting of Morrell, the Board holds that the Examiner did not fully consider the entire record, which the Board concludes demonstrates Morrell's unreliability (R. 274).

First, the decision indicts Morrell for having said that he arranged for Gerber's discharge "after he had secured written statements from three or four employees who had complained that they had been threatened by Gerber" (R. 274). This is not a fair analysis of Morrell's testimony considered in its entirety.

Morrell testified that after being notified of the situation by Gerber's supervisor he interviewed "—six or seven, possibly eight—" (R. 2713), and that they each confirmed they had received threats from Gerber that if they did not join 751 they would not have a job within thirty days and that these threats were made during working time. Morrell asked each if they would give a written statement, and "Some said they would and some said they would not." (R. 2714). Upon being asked whether written statements were subsequently obtained, he replied, "They were, yes." This is not the equivalent of saying that he [Morrell] had obtained the written statements.

The next two questions are the only possible basis for the Board's finding:

> "Q. And they confirmed their oral statements to you? A. Yes, that is true.
> Q. And on the basis of that, did you participate in recommending his dismissal?
> A. I did, yes." (R. 2714)

The foregoing does not justify the Board's conclusion that Morrell falsely testified that he secured

written statements and thereafter arranged for Gerber's discharge.

This testimony also conveys the meaning that, because of threats to fellow employees which Morrell confirmed by personal interviews, he then arranged for and executed Gerber's termination. Significantly, as his testimony continued, he testified that upon handing Gerber his termination notice, he told Gerber why he was being terminated and that he had confirmed it by interviewing the witnesses (R. 2714).

Next, Morrell is charged with testifying that he was present when the Factory Review Board considered Gerber's case, although Gerber said he was not. The Board found that, "the Respondent's records support Gerber's testimony in this respect" (R. 274). The Company record supposed to thus support Gerber is set out in full in the record (R. 2723-2724).

Morrell was questioned as follows:

> "Q. Following that, did you participate in any review of the action taken?
> A. Yes, I did.
> Q. And was Mr. Gerber ever present at any of these reviews then?
> A. I believe he was.
> Q. That you recall?
> A. I believe he was. I can't say for sure." (R. 2714-2715)

The Company record shows that on December 13, 1948, Gerber was interviewed by a committee and notes that "Mr. Gerber was then told that he would

be notified on the Company's action by the end of the week. Morrell was then called in, and he stated that he had talked to several employees who said that they had been approached. * * * " (R. 2724). If anything, the record confirms Mr. Morrell's testimony that he did participate with the Review Committee and only by severe straining can it be said that he ever testified that Mr. Gerber was present at the same time, and, even if that is the fair import of his testimony, he makes a far from positive assertion when he says, "I believe he was. I can't say for sure."

Thus, on the basis of the questions and answers above noted, the Board concludes that they were privileged to disregard the Trial Examiner's credibility findings. This is contrary to the decisions involving this subject. In *National Labor Relations Bd. v. Universal Camera Co.,* 340 U.S. 474, 496, the court said:

> "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

In *National Labor Relations Bd. v. Universal Camera Co.,* 2 Cir., 190 F. 2d 429, 430, which is the same case upon remand, Judge Hand observed:

> "Perhaps as good a way as any to state the change effected by the amendment is to say

> that we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."

National Labor Relations Bd. v. Supreme Bedding & Furniture Mfg. Co., 5 Cir., 196 F. 2d 997; *National Labor Relations Bd. v. West Coast Casket Co.,* 9 Cir., 205 F. 2d 902.

There is not the requisite substantial preponderance required to reject the Trial Examiner's credibility findings, but on the contrary there is substantial evidence in support thereof.

The Examiner said:

> "I credit the testimony of Lynn Morrell that he reasonably believed Gerber to be guilty of making threats to those who would not join Lodge 751. This conclusion is supported by other evidence * *" (R. 204)

This finding should be adopted and Gerber's case dismissed.

The Layoffs and Demotion

Background

Following the conclusion of the strike, three events occurred necessitating a reduction in the work force. In April 1949, layoffs occurred as a result of the cancellation by the United States Air Force of the B-54 production contract (R. 316). In August 1949, there was a rescheduling of the B-50 production, owing to trouble with Government-furnished equipment (R. 325). This resulted in layoffs in August, September, October and November

(Resp. Ex. 38; R. 2258). At about the same time the Stratocruisers were completed (R. 329). These events affected almost every shop, although some more drastically than others. Requirements as to work force would fluctuate from time to time in the several shops depending upon the stage of completion in relation to the production line (R. 320).

Mr. Heiland explained in detail the Company procedure concerning layoffs (R. 2382-2394). The determination that a given shop had a surplus might originate from the decision of the assistant foreman within the shop or from the top, by direction of the office of the Vice President of Manufacturing. Thereafter, the general foreman was free to utilize surplus employees elsewhere in his shop, provided the new assignment did not involve either a promotion or demotion. If the surplus employees could not thus be used, the names were then sent to Mr. Heiland's office to determine whether or not there could be a lateral transfer elsewhere throughout the Company's operation.

Furthermore, Mr. Heiland testified that during the war when the Company was building a single model airplane on a mass production basis, an employee doing this type of production might be qualified to do a simple repetitive assignment, whereas following the war practically all work involved custom airplanes and an employee had to be able to do eight or nine or a dozen assignments (R. 2382).

While Mr. Heiland's office relied quite a bit on the judgment of individual supervisors of all grades who would submit lists of surplus employees to him, he specifically testified, "I always have a hand in the surplusing of employees" (R. 317), and in response to the question, "The instructions with respect to layoffs, do they in all cases come from your office then?", he replied, "That is correct." (R. 2385).

Heiland's office did not normally have any knowledge of nor did they inquire of Accounting (the only source of information) concerning any individual's union affiliation (R. 2385).

After the strike, efforts were made to install a satisfactory performance rating or grading to evaluate each employee. By August of 1949, the Company had what it considered an accurate performance rating and these were used to determine who was to be laid off (R. 2394).

The Trial Examiner found that no general policy or over-all pattern with respect to layoff or refusal to rehire existed (R. 214). The Board adopted this finding.

Evidence on Haddix' Layoff

Madeline Haddix, a member of Lodge 751, was working on the "wash rack" at the time of the strike, went out on strike, and returned on September 13, 1948, to the same job, working under a

woman who had formerly worked under her (R. 881-882). According to Haddix, about a week after her return, the woman over her having complained of her work, foreman James moved her to a similar job on the wash rack upstairs, where she remained for more than a year. She was laid off on October 26, 1949, her termination slip being marked "Laid Off—Surplus employee" (R. 883-884, 887, 896-897; Gen. C. Ex. 73, R. 887).

Haddix testified that a few weeks before her lay-off, assistant foreman Welling remarked that some people would have to be laid off, and, turning to her, said, "The trouble with you is that you belong to the wrong union." (R. 884). Welling denied making any such statement (R. 2687).

James, Haddix' general foreman, testified that after the strike, someone else having taken Haddix' place on the wash rack, he attempted to shift her to a mechanic's job so she could retain her rating, encouraging her to study so she could move ahead (R. 2680-2681). However, after three weeks, Haddix admitted she couldn't perform the mechanic's work and was put back on the wash rack (R. 895, 2681). There, despite James' previous request that she refrain from doing so, she again caused friction with her fellow employees and her quarrelsome nature reasserted itself as a factor in the evaluation of her fitness (R. 2681-2682). As a result, James

moved her upstairs to an opening which he was able to create, where she remained until she was laid off (R. 2681-2682).

James, who was on vacation at the time of Haddix' layoff, testified that the cancellation of the B-54 contract, which created a surplus of employees in his shop, was the circumstance which led to Haddix' layoff (R. 2682), and in particular that she was laid off because there were two employees but only one job of that kind in the shop (R. 2680). Welling testified that the upstairs wash rack job was discontinued at the time of the B-54 cancellation, leaving but one job for Haddix and the other person having the same job title (R. 2684-2687). According to Welling, he and his immediate supervisor, Austad, in determining that Haddix was surplus, considered the comparative abilities of the persons involved, noting Haddix' inability to get along with other people (R. 2684-2686). He said that Haddix' membership in Lodge 751 did not enter into their consideration (R. 2684).

There is no evidence of union activity except that Haddix served as a shop stewardess for two months prior to the strike and helped at the union office during the strike (R. 882).

Haddix Was Laid Off Because of Her Lack of Versatility and Personnel Conflicts

The Trial Examiner credited Haddix' testimony

regarding Welling's remark about her belonging to the wrong union, but concluded that the evidence was not persuasive that her union membership was a consideration affecting her continuation of employment (R. 216). Contrary to the Examiner, the Board found that Haddix was selected for layoff because of her membership in Lodge 751 (R. 277-278). It premised its reversal of the Examiner's conclusion upon the fact that both Welling and James testified that the layoff was occasioned by the B-54 cancellation, whereas in fact this contract was cancelled in April 1949, and resulted in layoffs during April and May of that year, Haddix having been laid off in October. Further, in view of the fact that James was on vacation at the time of the layoff, it concluded that it could attach no weight to James' and Welling's testimony concerning the reasons for Haddix' selection (R. 277).

Accepting as a fact that Welling told Haddix she belonged to the wrong union, nonetheless, we contend, as found by the Examiner, that the evidence is not persuasive that Haddix' membership in Lodge 751 was a consideration affecting her selection for layoff. It is apparent from the record that her general foreman, James, did more than might reasonably be expected of someone in his position to help Haddix and keep her on the payroll. However, Haddix had practically no experience other than working on the wash rack, and she herself admitted that

she knew nothing of mechanic's work. Accordingly, when a surplus occurred and the upstairs wash rack job was discontinued, it is not surprising that a person with her obviously limited capabilities, experience and quarrelsome nature was selected for layoff.

We believe that the two factors seized upon by the Board in concluding that it could attach no weight to James' and Welling's testimony are without substance. It is true that the layoffs occasioned by the B-54 cancellation occurred in April and May 1949, but the record shows (R. 324-325) that there was another general layoff in the fall of 1949 caused by the B-50 rescheduling, 1462 employees being laid off during October, as was Haddix (Resp. Ex. 38; R. 2258). We acknowledge that Welling and James were mistaken in saying B-54 rather than B-50, but we submit that this understandable error was of minor importance. The Board also noted that James was on vacation at the time of Haddix' layoff. This in no way destroys the weight of his testimony, corroborated by Welling, that a surplus did occur and that Haddix was laid off because there were two employees but only one job in the shop. In any event, final surplusing took place in Heiland's office as more fully discussed, *supra,* pp. 43-44. We conclude that the General Counsel did not meet the requisite burden of proof in this case and submit that the Board's order with respect to Haddix should be set aside.

Evidence on Myrick's Layoff

Claude Myrick commenced employment January 1, 1940, and, except for nine months military service, was continuously employed until the time of the strike, at which time he was classified as "Sheet Metal Worker Maintenance A". He was a shop committeeman from 1943 or 1944 until laid off on October 21, 1949 (R. 1284; Gen. C. Ex. 116; R. 1292).

Foreman Keene testified that in the fall of 1949 there was a sizable shrinkage in the work load, resulting in a reduction from 40 to 25 employees in this shop (R. 3008). Myrick was laid off as the slowest man, over all, then on the payroll in this shop (R. 2987, 3024). At or about the same time that Myrick was laid off, four or five other employees in the same department were laid off, including at least three new hires (R. 3026-3027).

This department was cost conscious because if actual costs greatly exceeded the estimate made by Plant Facilities, this work, unlike the building of airplanes, could, and future work would, be placed with outside shops or contractors (R. 2988). Owing to Myrick's slowness, he consistently exceeded the estimated costs (R. 2291-2292).

Assistant foreman Watling testified that one of Myrick's last jobs exceeded costs between 25% and 30% (R. 2989). Both Myrick's assistant foreman and foreman testified that Myrick frequently en-

gaged in conversation with fellow workers on the job, interfering with his and their production (R. 2993, 3016). Myrick was placed on thirty days' probation in March of 1949 for refusal to observe orders of his supervisor (R. 2991). Myrick admitted criticism as to the speed of his work and acknowledged that his speed was slow, but thought it had improved (R. 1295, 1300).

Myrick signed his performance rating card dated September 14, 1949 (Resp. Ex. 77; R. 3030), which rated him "weak" as to quantity of work and cooperation and conduct, with an over-all rating of "fair."

Myrick Was Laid Off Because of Slowness

The Board based its reversal of the Trial Examiner on Myrick's testimony that, because he was unable to receive, at the time or shortly after receipt of layoff notice, any explanation from his foreman or others of the reason why he was selected for layoff, the reason must have been because of his position of leadership in Lodge 751 (R. 278-279). It is submitted that Myrick's knowledge of repeated criticisms as to the slowness of his production, his proneness to converse with fellow workers during working time, his probation a few months before for refusal to follow work instructions, and his performance rating were sufficient reasons, without re-

quiring further explanation, as to why he had been selected for layoff.

At the time of Myrick's layoff, Heiland's office considered the ratings accurate and used them in determining layoffs (R. 2394). The Board apparently derives some sinister connotation from the fact that Myrick's selection for layoff was determined by higher echelons of management (R. 278-279).

In view of the Company procedure for selection of persons to be laid off, as detailed, *supra,* pp. 43-44, it is submitted that the reports Myrick testified he received from other supervisors were completely consistent with this policy.

The proper conclusion to be drawn from the record is that Myrick's slowness was the motivating reason for his layoff.

Evidence on McDonald's Layoff

Clyde McDonald was first employed twenty-four days before the strike, went out on strike, did not make application for reemployment until January 10, 1949, when he was reemployed as "Assembler—Wire Group B", and was laid off August 5, 1949 (R. 963). McDonald testified that a Teamster organizer talked to him on several occasions, and finally McDonald told him that he, being an A.F. of L. man for many years, hoped that "if I ever work under the jurisdiction of the A.F. of L. in the Boeing air-

plane factory, it will be under the jurisdiction of the I.B.E.W." (R. 965). McDonald testified that these conversations were on a friendly level "just straight from the shoulder" (R. 969).

He testified that thereafter the organizer went to the shop foreman thirty or forty feet away and engaged in some conversation, but he did not know what was said. In less than thirty minutes McDonald said he received his slip (R. 965-966).

McDonald had one eye (R. 971).

Randall, general foreman over McDonald, testified that in the department where McDonald was employed there were 422 electricians in four labor grades on August 2, 1949, and by November 11, 1949, the number of employees had dropped to 195 (R. 2544); that in the distribution of labor grades there were 102 solderers, the lowest grade on August 2nd, and no solderers on November 11th, resulting in the necessary down-grading of A and B electricians.

Whereas there had been 78 A electricians and 152 B electricians and 90 C electricians on August 2nd, there were 55 A electricians, 124 B electricians and 16 C electricians in November. This reduction was occasioned by the completion of the Stratocruiser and the reduction in the B-50 load.

There were others laid off on the same day as McDonald (R. 2544-2545). Concerning the three laid off, Randall stated that, for the purpose of testifying, he had checked the payroll deduction

records because he had no prior knowledge, and found that McDonald was a member of 751, the second was a member of 451 and the third had no affiliation (R. 2546).

McDonald Was Laid Off Because One of Least Qualified

Based solely upon the testimony of McDonald that he saw a Teamster organizer and the assistant foreman engaged in conversation, the Board infers that the organizer *must* have communicated McDonald's expressed preference for I.B.E.W. and therefore he was laid off because of his opposition to 451. Thus, there is not even hearsay evidence but unadulterated speculation that any of McDonald's supervisors had any knowledge whatsoever of his alleged union preference. This Court aptly said, in *National Labor Relations Bd. v. Amalgamated Meat Cutters,* 9 Cir., 202 F. 2d 671, 673:

> "The Board is not permitted to arrive at conclusions based on such speculations."

No charge was ever made nor was the complaint amended at any time following McDonald's testimony to charge Boeing with discrimination against him for his preference for I.B.E.W.

In light of the established Company procedure for laying off surplus employees, it is straining credulity to hold that the proximity of the Teamster or-

ganizer incident played any part in McDonald's layoff.

It is submitted that an employee with a length of service with Boeing of approximately eight months and restricted physical capacity would normally be selected for layoff for this reason alone in a department having 227 layoffs in the space of three months. Any inference to the contrary is not supportable on the record herein.

Evidence on Schott's Demotion

Dorothy Schott, a "spot welder B" at the time of the strike, returned in October 1948 as a "worker general", was promoted in February 1949 to a "spot welder B", and on April 18, 1949, was downgraded to a "general helper" and assigned to the "wash rack" (R. 1995, 1997). James, Schott's general foreman, testified that there was a surplus of employees when Schott was demoted in April 1949; that higher-rated people were being downgraded rather than laid off; and that Schott voluntarily accepted her downgrade to avoid being laid off (R. 2698).

Schott testified that shortly after she came to work on the day shift, James called her to his office and told her of her demotion (R. 2005-2006). According to Schott, shortly before quitting time the same day, Lawrence, an assistant foreman on the swing shift (R. 2007, 3083), who was not her foreman, came past the wash rack and upon seeing

Schott said, "What in hell are you doing here? You have no business here. They sure have been downgrading you." (R. 1999-2000), and grabbing her button said, "Well, Holy God, you have got the wrong button." (R. 2000)

Lawrence, under whose supervision Schott had worked as a spot-welder before the strike, denied these remarks (R. 3089), and stated that he would not have been surprised to see Schott on the wash rack because, "in spite of the job she had attempted to hold in there, it would be my opinion that Dotty should never have had rated anything better than a helper's job." (R. 3091)

No exception was filed to the Examiner's failure to find Schott's demotion discriminatory; Schott, poorly qualified for her job, accepted a demotion to avoid being laid off as the result of a surplus.

The Examiner credited Schott's testimony regarding Lawrence's remark (R. 220), but failed to find that her demotion was discriminatory. Contrary to the Examiner, the Board found that she was demoted because of her membership in Lodge 751 (R. 279-280).

No exception was filed to the Examiner's failure to find that Schott's demotion was discriminatory (R. 228-258). Thus, we contend that as a matter of law under Section 10(c) of the Act the Board erred in not adopting the Examiner's recommended order with respect to Schott. *Citizen News Co.*, 100

National Labor Relations Bd. ....., No. 84, 29 LRRM 1116.

Secondly, we contend that the Board's finding is not supported by the evidence. The Board based its finding on two factors: (1) Lawrence's comment to Schott that she belonged to the wrong union, and (2) the absence of any explanation concerning the reason for her demotion (R. 279-280). The Board's reasoning presupposes that it reasonably can be inferred from Lawrence's comment that Schott's union affiliation was the motivating reason for her demotion. No such inference is possible, let alone reasonable. Schott admitted that Lawrence was not her foreman at the time of her demotion. There is no showing that he played any part in it whatever. Even the tenor of the supposed remark—surprise at her demotion—belies any such participation. According to Schott, Lawrence was on his way to work on the swing shift when he made the remark, Schott having been advised of her demotion that morning by her general foreman, James. Obviously the Board's finding is based on pure conjecture.

Furthermore, James did explain the reason for Schott's demotion, which occurred in April 1949, at the time of the B-54 cancellation surplus. Rather than lay off higher-rated employees, they were given a chance to move down. Schott voluntarily accepted her demotion in order to stay on the payroll.

It is noteworthy that before the strike Schott had been demoted because she was "found incapable of performing the duties of Spotwelder 'A'," as stated in a memorandum from Boeing to Lodge 751, signed by James and Kaiser, Schott's shop committeeman (Resp. Ex. 30, R. 3370, 2001-2003).

The Board's finding is wholly without support in the record.

4. NIELSEN NOT REHIRED

Boeing did not rehire Nielsen because of her poor work record, not because she had filed a charge.

Evidence on Nielsen

Christina M. Nielsen returned after the strike to her former job as clerk in Shop 701 (R. 1957-1959). In March 1950, between 100 and 125 workers in Nielsen's shop were laid off or transferred as the result of the completion of the B-47 tooling program, and Nielsen was among them (R. 2808-2810). She has never been recalled. On September 5, 1950, she filed a charge asserting that Boeing laid her off on March 3, 1950, and subsequently refused to reemploy her for discriminatory reasons (Case 19-CA-354, Gen. C. Ex. 1-U, R. 297, 1967). The only matter in issue is whether Boeing did not rehire Nielsen after her charge was filed because she filed it (R. 280).

Nielsen, her foreman, Graue, and one of her assistant foremen, Harris, testified concerning her work record prior to her layoff (R. 1954-1978),

2805-2826, 3612-3648); and their testimony was summarized by the Examiner (R. 173-175). In brief, according to Graue and Harris, Nielsen did a great deal of unnecessary talking on the job, as well as considerable "expediting" in an adjacent shop, Shop 442, which was not part of her job, both of which had a very adverse effect on the amount of assigned work she accomplished, which, in turn, caused lost time among other workers, as well as an unbalanced work load in the shop (R. 1976-1978, 2805-2807, 3614-3620, 3630, 3634). Graue (R. 2806-2807) and Harris (R. 3613-3643) testified that her job was limited to writing requisitions for the materials used in her shop and that very little conversation was required. However, Nielsen explained at length that "every requisition meant some conversation" (R. 1975) and, as she saw it, writing requisitions was only a portion of her job—"Steel had to be checked, and substitutions made, and expedited * *" (R. 1976). She admitted that Harris warned her against doing Shop 442's work and told her to stop checking the availability of steel (R. 1977-1978). According to her, she did stop, except in isolated cases when a mechanic wanted her to do it. (R. 1978). Graue had Harris run a check on the number of requisitions Nielsen wrote per day, which showed an average of about 26 as against 180 written by the girl on the second shift (R. 2805-2806, 3614-3617).

Graue constantly was told by supervisors about Nielsen's lack of interest in her job and continuous talking and the small amount of work she was doing (R. 2805, 2814). Harris, after warning her in vain about unnecessary talking (R. 3618-3619), finally put an action memo about it in her personnel folder (R. 3620-3621). Such memos would be considered in time of surplus in selecting those to be laid off (R. 2807-2808), and go against an employee's record (R. 3626).

According to Nielsen, on March 3, 1950, when she was laid off, Harris told her she would not be needed any further (R. 1959) and, when she complained to Graue, he said that according to her records there were no complaints about the quality of her work, but there were as to quantity (R. 1959-1960). She then went to Cottet, employment interviewer supervisor (R. 3913), whom she knew, asking about the proper procedure for getting back on, and after she told him her termination slip was marked "Lay-off," he said, according to her, that she would be recalled in a routine manner when the work load would make it necessary, "or something to that effect" (R. 1966).

According to Nielsen, shortly before September 5, 1950, the date she filed her charge, she talked to Fouty, Lodge 751 business representative (R. 2228), and had him call Huleen, assistant labor relations manager (R. 1967-1968, 3259). Fouty told Nielsen

that Huleen said he would call him back with a report (R. 1968). She testified that before Huleen did so, she filed her charge, asserting that Boeing had laid her off on March 3 and since refused to reemploy her because of her membership in and activities on behalf of Lodge 751. Very shortly thereafter she told Cottet she had just filed the charge and asked him to check on her desirability for rehire (R. 1968-1969). He referred the matter to Huleen, who called Nielsen and, according to her ,told her that she was undesirable for rehire at that time, that she had a poor work record ,and something else which she didn't understand and couldn't remember (R. 1969). Within a month she called Huleen, and, according to her, he said it would be pointless for her to see him because "my work record would in no way encourage a rehire" and, although the Company might take her back if the need were very great, "at the present time there was no reason, in fact, to think I would be desirable for rehire" (R. 1969-1970). She then saw Graue and, she testified, asked him "if he could *alter* my record to make me available for rehire" and he said he would see (R. 1970). A week later she called Huleen, who told her he had talked to Graue and that this talk had not altered her status (R. 1971). Later she sent a written statement to Huleen, through Fouty, and Fouty advised her that Boeing was still not interested in rehiring her

(R. 1971). That was her last contact with the Company (R. 1971).

Huleen testified that he was first contacted concerning Nielsen's rehire possibilities after September 1, when Fouty called (R. 3923). He then reviewed Nielsen's file and found that she had been given a low performance rating prior to her layoff, which carried a notation that she was generally prone to disregard plant rules (R. 3923, 3925). He also recalled finding Harris' memo regarding her unnecessary conversation (R. 3925). After he reported this information to Fouty, Cottet called him and told him that Nielsen had come in to see him and that he was referring the matter to Huleen (R. 3924). The following day Huleen called Nielsen at her home and advised her that in the Company's opinion there were other people more qualified for the available openings and that Boeing had found that she engaged in unnecessary conversation on the job (R. 3924). About two weeks later a summary of her work record, including the criticism regarding her proneness to unnecessary conversation, was prepared by the superintendent of her shop and placed in her file at the employment office (R. 3924-3925).

Nielsen Not Rehired Because of Poor Work Record

The Examiner found that there was no substantial evidence that Boeing's failure to rehire Nielsen was unlawfully motivated (R. 215). Contrary to the

Examiner, the Board found that beginning in September 1950 and thereafter, Boeing did not rehire Nielsen because she had filed a charge, thereby violating Sections 8(a)(4) of the Act (R. 280).

Since Nielsen's charge was filed on September 5, 1950, the decisive question is whether after that date the filing of the charge became the motivating reason Boeing did not rehire her. Although the reason Boeing laid her off in March and did not rehire her prior to September 5 is not in issue, we believe the record conclusively shows it to have been her proclivity for unnecessary conversation and her poor performance on the job. The Board has not found otherwise. We contend that her poor record continued to be the motivating reason for not rehiring her after September 5. In any event, we submit that there is not the slightest evidence in the record from which it can reasonably be inferred that Nielsen's charge ever had anything whatever to do with her reemployment possibilities at Boeing. We think it clear that the Board's conclusion is mere speculation, but we wish to point out some of the fallacies in what appears to be the reasoning underlying the Board's failure to accept the Examiner's finding.

In support of its finding the Board purported to detect some change in what Boeing advised Nielsen before and after her charge was filed, as to the possibility of her being rehired (R. 280). It relied on

Nielsen's testimony that shortly after her layoff Cottet told her she would be "recalled in a routine manner when the work load would make it necessary" or something to that effect (R. 280, 1966). It is apparent from Nielsen's testimony that Cottet did not examine her personnel folder before making this offhand remark because he had to ask Nielsen what type of termination slip she had and what it said (R. 1966). Even if he then knew of her poor record, we submit that his remark was appropriate. Furthermore, Nielsen did not purport to remember his exact words (R. 1966).

To show a change in Boeing's attitude after the charge was filed, the Board relied on what Nielsen said Huleen told her, namely, that "my work record would in no way encourage a rehire" and "at the present time there was no reason, in fact, to think I would be desirable for rehire" (R. 280, 1970). Even assuming that Nielsen could remember the precise words Huleen used, we think it obvious that they do not show any change in Boeing's attitude toward her nor belie a continued failure to take her back because of her poor record.

The Board also observed that Graue's testimony establishes that there was nothing in her record to *prevent* her rehire (R. 280). Of course this is true in the sense that her record does not disclose something, such as dishonesty, which would absolutely

prevent her rehire. However, it is perfectly consistent with the position taken by Boeing.

This is a case where the demeanor of the witness has particular significance. The Examiner could rightly conclude that Nielsen's proclivity for conversation and resulting inefficiency was the *real* and sufficient reason why Nielsen was not rehired. See, for example, R. 1977-1978. It is significant that General Counsel abandoned her case in his brief before the Board, thus lending further support to our argument based on demeanor. The Board, viewing the printed record, resorts to artificial refinements of the precise words spoken by the witness, when the witness herself did not pretend to be doing more than relating the substance of conversations.

5. ASSISTANCE AND SUPPORT OF LOCAL 451

Before considering the evidence, it seems necessary to outline the Board proceedings with respect to this issue. It was alleged that Boeing unlawfully dominated, assisted, sponsored, maintained and contributed support to the Teamsters, Local 451, both during and after the strike (R. 26-27). The Examiner failed to find that any of Boeing's acts during the strike were unlawful (R. 218-219) and specifically that there was no evidence that Boeing had ever dominated Local 451 (R. 220). However, based upon the evidence as to three specific acts, namely, (1) Local 451 employment referrals, (2) Klein's

dues deduction, and (3) Carrig's promotion, the Examiner found that for a time following the end of the strike Boeing assisted and supported the Teamsters (R. 219-220). The Examiner's findings and conclusions were adopted by the Board without change or comment (R. 270). In addition, the Board found that the discharge of Gerber constituted additional unlawful assistance and support (R. 277). If the Board's finding with respect to Gerber's discharge is reversed, as we have urged elsewhere herein, that will also dispose of this particular issue. Accordingly, we make no further argument at this point. With this introduction, the evidence may be considered.

Evidence on Teamster Referrals

In aid of its effort to recruit additional employees during and after the strike, Boeing had referral arrangements with six or seven large employers and labor organizations in Seattle, including Local 451, whereby persons seeking employment were referred to Boeing (R. 352). The Board found that Boeing's referral arrangement with Local 451 did not violate the Act (R. 219). However, it concluded, on the basis of the testimony concerning five persons referred to Boeing by the Teamsters, that for a time individuals referred by that union were preferred for employment over those without such reference (R. 219). The five referrals on which the Board

relied in making this finding, with references in each case to the findings summarizing the testimony, and the testimony, were:

Klein (R. 189-190, 2045-2048, 3915-3916).
Brody (R. 190-191, 2110-2113, 3947-3948).
Courtier (R. 190-191, 2110-2113, 3913-3914).
Boitnott (R. 191, 2118-2121, 3946-3947).
Heston (R. 193, 2032-2034, 3914-3915).

In the interest of brevity we will not review this testimony in detail.

In general, each of the five testified that following the strike he applied for employment at Boeing with an employment referral from Local 451 and was hired.

Evidence on Klein's Dues Deduction

The second act on which the Board relied in finding unlawful assistance and support was that Boeing declined to permit Klein to cancel his Local 451 dues deduction authorization at a time when the rules published by Boeing for the guidance of employees provided that such a deduction could be cancelled at any time upon written notice (R. 193-194, 219). Klein, a member of Local 451, was employed on February 4, 1949 (R. 3915). He testified that after one month he attempted to cancel his dues deduction authorization (R. 2048). He was told by the Company that he could not do so because he had signed an authorization covering a period of one

year and there was nothing the Company could do about it (R. 2049).

In November, 1948, Boeing published and distributed to its employees a booklet entitled "For Your Information" (Resp. Ex. 44; R. 2303-2304). This booklet was distributed to inform employees of the general terms and conditions of their employment, there being no collective bargaining agent or agreement at that time. Eight different types of payroll deductions, including "Union Dues", which the Company was willing to make when authorized by the employee, were listed in this booklet. Following this listing appeared this statement: "You may cancel any deductions you have authorized by giving a written notice to the Company."

Mr. Graham, secretary and treasurer of Local 451 at all times since September or October, 1948, and responsible for the administration and operation of that organization, was called as a witness by the General Counsel (R. 2924-2925). He testified that until early in 1949 the dues deduction authorizations used by Local 451 were revocable, but that at that time they commenced the use of irrevocable authorizations (R. 2930).

Evidence on Carrig's Promotion

The third act on which the Board relied in finding unlawful assistance and support was the denial of Carrig's promotion to a supervisory position, al-

legedly because the promotion was opposed by Local 451 (R. 219).

The only evidence on this issue is Carrig's testimony (R. 2192-2205), which was accurately summarized by the Examiner (R. 191-193). In substance, Carrig, a relief timekeeper, testified that in December, 1948, his supervisor, Morrell, chief timekeeper, selected him for promotion to a supervisory job. However, he was not promoted. According to Carrig, Morrell told him that his promotion was blocked by higher management. Carrig said Morrell told him Boeing's treasurer said, "* * * it looked like Mr. Logan [Vice President] was in bed with the Teamsters" (R. 2199).

No Preference Shown Teamster Referrals

The Board's conclusion that individuals referred by Local 451 were preferred for employment over those without such referrals is purely speculative. Thus, Klein applied in January, was told he might be called, returned in February with a referral, and was hired. Obviously, the effect of the referral is purely conjectural. Courtier and Brody applied in September during a period when the Company had suspended hiring new applicants in order to return strikers to the payroll as soon as possible. When they returned in October with referrals, the Company had resumed hiring and they were hired. Again, the effect of the referral is conjectural. Boit-

nott applied twice on the same day, but filled out a new application and talked to a different interviewer on the second occasion. In the interim, a job requisition may have been filed with Personnel or the two interviewers could reasonably have differed in evaluating his potential. This, as well as the evidence relating to Heston, is merely circumstantial and entitled to little weight. We submit that the evidence does not preponderate in favor of the inference drawn by the Board. Evidence to be weighed against this conclusion is the testimony of six other persons that they had 451 referrals and yet did not succeed in securing employment (R. 2150-2151, 3937; Resp. Ex. 22, R. 1222; Resp. Ex. 19, R. 941-943; R. 462, 464, Resp. Ex. 12, R. 467; Resp. Ex. 15, R. 806-807).

Klein's Authorization Irrevocable

In finding that the Company's refusal to permit Klein to cancel his dues deduction authorization was unlawful, the Board relied on the fact that the Boeing rules then in effect permitted such cancellation (R. 219). It is clear from Graham's testimony that Local 451 adopted the irrevocable authorization forms after the rule booklet was published. Thus, the rule was simply out-of-date at the time Klein requested that his authorization be cancelled.

In any event, the Board has not found that Klein's union dues authorization was revocable. In view of

the adoption of the irrevocable form early in 1949 (R. 2930) and Klein's testimony, credited by the Examiner (R. 194), that he was told that his authorization was irrevocable for one year (R. 2049), we submit that the record establishes that Klein signed an irrevocable authorization on February 3, 1949 (R. 2049-2051, 3915). Section 302(c) of the Act recognizes the validity of authorizations irrevocable for one year where there is no collective bargaining agreement in effect. Thus, Boeing was powerless to cancel Klein's authorization.

Denial of Carrig's Promotion Insignificant

The only evidence in the record in support of the Board's finding that Carrig's promotion was denied because of Local 451's opposition is Carrig's testimony of the conversations between third parties related to him by Morrell. Clearly this is hearsay evidence having no probative value to establish the truth of what the third parties said. *National Labor Relations Bd. v. Amalgamated Meat Cutters,* 9 Cir., 202 F 2d 671. Boeing excepted to the Examiner's reliance on Carrig's testimony on this ground (R. 266), but the Board adopted the Examiner's finding without comment. The Examiner treated Morrell's remarks as admissions by Boeing (R. 219). Such statements by an agent are admissible against his principal to prove the truth of the facts asserted only if the agent was authorized to make the state-

ments or to make true statements concerning the subject matter. *Restatement of the Law of Agency,* Section 286. Although Morrell may have been authorized to recommend Carrig for promotion and to advise him that he had not been promoted, we contend that there is no evidence in the record from which it reasonably can be inferred that he was authorized to make statements concerning the reason Carrig was not promoted.

Even if Morrell's statements to Carrig are treated as admissions, they do not support the Board's finding. When asked what Morrell told him Logan's reasons for turning down his promotion were, Carrig also said, "Oh, it was due to union activity. They were concerned or quite put out about my activities during the strike." (R. 2198). Carrig said that he was on the Lodge 751 public address system for a week and that the Company particularly objected to this (R. 2198-2199). Thus, it is purely conjectural that the supposed opposition of Local 451 was the motivating reason for denying Carrig's promotion. In any event, the incident is so trivial as not to amount to assistance and support.

In conclusion, with respect to this issue we submit that the evidence relating to the minor acts relied upon by the Board does not preponderate in support of its finding that Boeing unlawfully assisted and supported Local 451.

6. STATUTE OF LIMITATIONS

Allegations as to Haddix, Myrick, McDonald and Schott are barred by Statute of Limitations.

We contend here, as we did before the Examiner (answer, R. 51; motion, R. 52) and the Board (exception 1, R. 259), that the allegations in the complaint pertaining to the layoffs of Haddix, Myrick and McDonald and the demotion of Schott are barred by the six-months' statute of limitations prescribed by Section 10(b) of the Act. We urge that these allegations are not based on timely charges of sufficient breadth to support them. Briefly, the allegations we challenge are those alleging:

1. Haddix' layoff on October 21, 1949 (par. XVI, R. 13-15)—added by first amendment to complaint (Gen. C. Ex. 1-E, R. 296), issued April 23, 1951.

2. Myrick's layoff on October 21, 1949 (par. XVI, R. 13-15)—added by second amendment to complaint (Gen. C. Ex. 1-NN, R. 298), issued May 24, 1951.

3. McDonald's layoff on August 9, 1949 (par. XVI, R. 13-14)—alleged in original complaint (Gen. C. Ex. 1-Z, R. 297), issued on March 29, 1951.

4. Schott's demotion on April 18, 1949 (par. XXIII J, R. 25)—added by third amendment to the complaint (Gen. C. Ex. 1-QQ, R. 298), issued on June 15, 1951.

Haddix, Myrick and Schott were not named in

any charge filed before the above allegations were added to the complaint. Subsequently, Haddix, Myrick and McDonald were named in the amendment to charge No. 19-CA-175 (Gen. C. Ex. 1-M, R. 296), filed June 15, 1951. Schott has never been named in any charge. Although it was asserted in charge No. 19-CA-175 (Gen. C. Ex. 1-K, R. 296), filed March 15, 1949, that Boeing failed to rehire McDonald after the strike, he was rehired in January 1949, and his subsequent layoff on August 9, 1949, was not charged until June 15, 1951, as above noted.

It is apparent that none of the allegations in question was charged or added to the complaint within six months of the occurrence of the alleged unfair labor practices, as was the case in *National Labor Relations Bd. v. Globe Wireless Ltd.,* 9 Cir., 193 F. 2d 748.

Clearly these allegations are barred unless this Court holds that some prior charge forms a sufficient basis for their issuance.

The relevant prior charges are:

1. No. 19-CA-135 (Gen. C. Ex. 1-A, R. 1), filed on September 20, 1948, relating to the Teamsters and Cinotto and Burrell.

2. No. 19-CA-175 (Gen. C. Ex. 1-K, R. 296), filed on March 15, 1949, asserting certain refusals to rehire, discharges, and reemployments to lesser jobs.

Both of these charges were filed before the occurrence of the alleged unfair labor practices. The

Board's decision (R. 63), holding that charge No. 19-CA-135 forms a sufficient basis for the entire complaint, appears to be based on the premise that, once a charge has been filed against an employer, a complaint may thereafter be issued at any time alleging any number of unfair practices regardless of what relationship, if any, the practices alleged bear to those asserted in the charge. We recognize that a complaint may untimely enlarge upon a *timely* charge under the "relation back" theory *under certain circumstances.* (*National Labor Relations Bd. v. Martin,* 9 Cir., ... F. 2d ....., 33 LRRM 2046 (October 19, 1953)). However, relation back is possible only where "the violation and the facts constituting it remain the same" (*National Labor Relations Bd. v. Gaynor News Co.,* 2 Cir., 197 F. 2d 719, 721), the new matter is "inherent in or connected with the original charge" (*Kansas Milling Co. v. National Labor Relations Bd.,* 10 Cir., 185 F 2d 413, 415), or is "based upon a closely related factual situation" (*National Labor Relations Bd. v. Kobritz,* 1 Cir., 193 F. 2d 8, 15), or where a "continuing violation," such as the continuing enforcement of an illegal contract (*Katz v. National Labor Relations Bd.,* 9 Cir., 196 F. 2d 416), or repeated refusals to bargain (*National Labor Relations Bd. v. White Construction Co.,* 5 Cir., 204 F. 2d 950), are involved. It is clear that the "continuing violation" theory does not apply to a layoff, demotion, or a subsequent failure

to rehire (*National Labor Relations Bd. v. Pennwoven, Inc.*, 3 Cir., 194 F. 2d 521; *National Labor Relations Bd. v. Childs Co.*, 2 Cir., 195 F. 2d 617), and we submit that the allegations are not sufficiently connected with the matters asserted in charge No. 19-CA-135, or any of the other charges in this case, to relate back. To hold otherwise is to render the six-months' proviso virtually meaningless in disregard of the legislative purpose to afford employers some measure of protection against stale charges. *Legislative History of the Labor Management Relations Act* (1947) Vol. 1, pp. 331, 432, 557. Since this is a statute of limitations, whether or not Boeing was prejudiced by having to defend these untimely allegations is irrelevant.

7. THE OMNIBUS ORDER UNWARRANTED

The activities of Boeing, as shown by the record in this case, do not indicate a purpose to defeat the self-organization of its employees and are not potentially related to future unfair labor practices. The issuance of a broad cease and desist order is unwarranted.

The background of this entire proceeding has been fully discussed, including the number of cases, length of the hearing, and the final result. As the Board decision now stands, Boeing has been found guilty of violating Sections 8(a)(1), (2), (3) and (4) of the Act in several instances. Even assuming that all counts will be affirmed by this Court, the

few specific cases should be viewed in proper focus. The history, climate of the times and subsequent circumstances are vital factors to be considered in determining whether a broad order is warranted. Placing the few specific cases in perspective with the following factors: (a) the long strike, engendering hostility between those who worked and the returning strikers, (b) the working force, ranging from 14,000 to 20,000, (c) the alleged unfair practices, occurring within a relatively short period following the strike, (d) no Company history of anti-union bias, and (e) the amicable relations between Boeing and the complaining union, Lodge 751, since 1950, demonstrates that no broad order is warranted.

During the course of the Examiner's hearing, the General Counsel cautioned the hearing officer lest he prejudge the individual cases, thereby missing the over-all pattern of discrimination, which he contended existed, against Lodge 751 members. The Examiner's disposition of General Counsel's contention was unequivocal. After listening to the witnesses for a period of three months and preparing a detailed Intermediate Report, he concluded:

> "I am not convinced that such a general policy existed." (R. 214).

This finding was adopted by the Board (R. 270).

As to the remedy, the Examiner, based on his

first-hand knowledge of the entire record, categorically stated:

> "As the record does not indicate a general disposition to violate the Act, a broad cease and desist order will not be recommended." (R. 223)

Although the General Counsel took exception to this recommendation, he advanced no argument on this issue to the Board. Despite the foregoing, the Board issued a broad order (R. 283-284, 286).

We recognize that the Board is vested with authority to fashion a remedy. However, it may not act arbitrarily. Furthermore, the Trial Examiner's findings are now, under the decision in *Universal Camera Corp. v. National Labor Relations Bd.,* 340 U.S. 494, 496, to be given greater weight than theretofore. The Trial Examiner, having heard the evidence, seen the witnesses and lived with the case, is best qualified to determine Boeing's "general disposition," and his findings should not be disturbed unless error is clearly shown.

In *Wyman-Gordon Co. v. National Labor Relations Bd.,* 7 Cir., 153 F. 2d 480, 483, the court held that where the Board disagreed with the Trial Examiner's findings and recommendations,

> "* * * such contrariety of views may be properly taken into consideration, in fact, [we think] that it has a material bearing upon the question as to whether the Board's findings are substantially supported." (citing cases)

In *National Labor Relations Bd. v. Express Publishing Co.,* 312 U. S. 426, 433, the court defined the

Board's authority as not broad enough to permit an order restricting:

> "* * * generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

Continuing, the court said at p. 435:

> "But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

See also *May Department Stores Co. v. National Labor Relations Bd.,* 326 U. S. 376, 392.

This Court has applied the *Express Publishing Co.* rule and refused to enforce omnibus orders without a clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally.[1]

In *National Labor Relations Bd. v. Walt Disney Productions,* 9 Cir., 146 F. 2d 44, this Court considered a broad cease and desist order and declined enforcement, observing:

> "This command is but a repetition of the statutory rights of employees which employers are bound to respect. The employer cannot by such

[1] **Richfield Oil Corp. v. National Labor Relations Bd.,** 9 Cir., 143 F. 2d 860; **National Labor Relations Bd. v. Kinner Motors,** 9 Cir., 152 F. 2d 816, modified on other grounds, 154 F. 2d 1007; **National Labor Relations Bd. v. Van de Kamp's, etc., Bakers,** 9 Cir., 152 F. 2d 818, modified on other grounds, 154 F. 2d 828.

a blanket order be put in danger of being hailed into court upon a citation for contempt for any subsequently alleged violation of the Labor Act without accusation and trial before the Labor Board.

We confidently expect a reversal by this Court of all, or at least most, of the Board's decision, but again assuming complete affirmance, the record does not approach the flagrant situation considered by this Court in *National Labor Relations Bd. v. Cowell Portland Cement,* 9 Cir., 148 F. 2d, 237, wherein the respondent shut down its plant and discriminately discharged all of its employees to compel them to disavow the exclusive bargaining representative with whom the company refused to bargain and to become members of a new company-sponsored local with whom it made an illegal, closed shop contract. These were held violations of Sections 8(a) (1), (3) and (5) of the Act. With respect to the broad order, this Court said, at p. 244:

> "This in effect is a blanket order restraining respondent from violating the statute in any manner. We think such a blanket order unwarranted and decline to enforce it."

As Judge Hand said reversing the Board in *National Labor Relations Bd. v. James Thompson & Co., Inc.,* .....F. 2d ....., 22 LW 2254, 2255 (December 2, 1953) when the Board reversed the Examiner:

> "Over and over again we have refused to upset findings of an examiner that the Board has affirmed, * * * because we felt bound to allow for the possible cogency of the evidence that

> words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words, and it must be owned that few findings will not survive such a test."

We submit that the Examiner was in a better position to ascertain the intangible "general disposition" of the Boeing organization than the Board, which merely reviewed a printed record. Upon the whole record, the issuance of an omnibus cease and desist order is arbitrary and capricious.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition to set aside the Board's order should be granted and that the petition for enforcement should be denied.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136; 29 U. S. C. A. Sec. 151, *et seq.*) are as follows:

"UNFAIR LABOR PRACTICES

"Sec. 8.(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the

Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days

after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint * * *
* * *

"(c)* * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.* * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period

as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Sec. 302 * * *

(c) The provisions of this section shall not be applicable * * * (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from such employee, on whose account such de-

ductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner;* * *"

Aero Mechanic—September 16, 1948

(Resp. Ex. 69)

"On Monday morning, when strikers first appeared at the Boeing plant for reinstatement, the huge crowd of loyal Aero Mechanic members completely filled both sides of 15th Avenue So. They arrived shortly after 6 o'clock in the morning, with their cars filling the parking lots, and took stands alongside the main gate.

The Seattle Police Department was there in full force, with so many uniformed officers in attendance that onlookers wondered if there were any police left to protect the rest of the city. Besides the scores of patrolmen, there also was a regiment of 30 motorcycle officers. In addition, there were scores of Company guards within the gates, stepping on each other's feet.

When the members of Boeing's 'permanent team'—the strikebreakers—appeared on the horizon, the strikers greeted them with shouts and calls. They were described as strikebreakers, and people without souls, and by many other vivid but descriptive terms.

It had been expected that a number of strikebreakers would appear, but it was apparent that the majority of them must have become frightened away by the huge number of Aero Mechanic strikers and stayed away. It later was learned that score on score of strikebreakers stopped their cars on Boeing Hill, overlooking the plant, and remained on the hill watching the proceedings rather than force their feeble courage into allowing them to brave the looks of contempt in passing loyal Union people.

* * *

"The Union loudspeaker carried the refrain of numerous tunes to strikebreakers as they scurried thru police lines. These tunes were, 'Who's Sorry Now,' 'I'll Be Glad When You're Dead You Rascals, You,' and the 'Old Gray Mare She Ain't What She Used to Be.'

The Teamster puppets, those unfortunate strikebreakers who have signed up with the Teamsters Union, were greeted by the Union loudspeaker with the words, 'Here come those mule skinners, warehousemen and stable boys.' "